



Notre Dame Law Review

Volume 87

Issue 5 *Symposium: Educational Innovation and the Law*

Article 11

6-1-2012

Resolution VI: The Virginia Plan and Authority to Resolve Collective Action Problems under Article I, Section 8

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ARTICLES

“RESOLUTION VI”: THE VIRGINIA PLAN AND AUTHORITY TO RESOLVE COLLECTIVE ACTION PROBLEMS UNDER ARTICLE I, SECTION 8

*Kurt T. Lash**

American courts have traditionally followed the general principle of limited enumerated federal power in determining the scope of national authority. Recently, however, a group of influential constitutional scholars such as Jack Balkin, Robert Cooter, Andrew Koppelman, Neil Siegel and others have called for doing away with this traditional principle and replacing it with the principle declared in Resolution VI of the Virginia Plan. Originally introduced in the Philadelphia Constitutional Convention, Resolution VI declares that federal power should be construed to reach all matters involving the “general interests of the Union,” those to which the “states separately are incompetent” and those affecting national “harmony.” Under this principle, Congress has power to regulate all collective action problems of national importance. In support of their claim, Resolution VI proponents argue that the members of the Philadelphia Convention adopted Resolution VI and sent the same to the Committee of Detail with the expectation that the resulting text would be based on this overriding principle of national power, and that the framers accepted the text of Article I, Section 8 as the enactment of Resolution VI. These scholars also claim (or rely on the claim) that Philadelphia Convention member James Wilson publicly declared during the ratification debates that the framers based Article I, Section 8 on the principle of Resolution VI.

A close reading of the historical sources, however, shows that the framers did not view Article I, Section 8 as having operationalized the general principle of Resolution

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* The author thanks Randy Barnett, Michael McConnell, Henry Monaghan, Stephen Presser, Robert Pushaw, Neil Siegel, Lawrence Solum and G. Edward White for their helpful comments and suggestions. I also thank Jack Balkin for his help in clarifying both his and my differing positions regarding the nature and implications of the historical evidence.

VI and authorizing federal action in all cases in which the “states separately are incompetent.” In fact, they expressly stated otherwise. Even more importantly, it turns out that there is no historical evidence that Resolution VI played any role whatsoever in James Wilson’s speech or anywhere else during the ratification debates. Claims to the contrary are based on errors of historical fact.

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INTRODUCTION

Currently, the Supreme Court interprets federal power under Article I, Section 8 in a manner that emphasizes both limited textual enumeration¹ and the need for judicial maintenance of the line between federal and state authority.² Recently, however, a group of

1 Chief Justice John Marshall established the principle of limited enumerated power. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819) (noting that “a great substantive and independent power” such as levying taxes required express enumeration and “cannot be implied as incidental to other powers, or used as a means of executing them”); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824) (“[T]he enumeration presupposes something not enumerated . . .”). These two cases currently serve as foundational precedents for the modern jurisprudence of federal power. For current cases relying on the limited enumerated federal power reasoning of *Gibbons* and *McCulloch*, see *infra* notes 2, 15–17, and 23–24.

2 See, e.g., *United States v. Morrison*, 529 U.S. 598, 616 n.7, 617–18 (2000) (citing *Gibbons* and asserting that proper construction of federal power “requires a distinction between what is truly national and what is truly local”); see also *United States v. Comstock*, 130 S. Ct. 1949, 1967–68 (2010) (Kennedy, J., concurring) (discussing the

influential constitutional scholars including Jack Balkin, Robert Cooter, Andrew Koppelman, Neil Siegel and others have suggested that courts ought to embrace Resolution VI of the 1787 Virginia Plan as the guiding principle for interpretation or construction of federal power under Article I, Section 8.³ According to Resolution VI, federal power should be construed to reach all matters involving the “general

Court’s Necessary and Proper jurisprudence, including the decision in *McCulloch v. Maryland* and concluding “[i]t is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause; if so, that is a factor suggesting that the power is not one properly within the reach of federal power”).

3 See JACK M. BALKIN, *LIVING ORIGINALISM* 906 (2011); Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 6–15 (2010); Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 123 (2011); Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1, 12 (2011); David M. Metres, Note, *The National Impact Test: Applying Principled Commerce Clause Analysis to Federal Environmental Regulation*, 61 HASTINGS L.J. 1035, 1051 (2010); Stephen F. Williams, *Preemption: First Principles*, 103 NW. U. L. REV. 323, 326 (2009); see also Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 555 (1995) (arguing that Resolution VI provides the correct interpretive framework for considerations of federal power). Even when not made the focus of constitutional theory, Resolution VI sometimes plays an oblique role in scholarly accounts of federal power. Consider, for example, the following footnote in Akhil Amar’s recent book on the American Constitution:

Federal power over genuinely interstate and international affairs lay at the heart of the plan approved by the Philadelphia delegates. According to the Convention’s general instructions to the midsummer Committee of Detail, which took upon itself the task of translating these instructions into the specific enumerations of Article I, Congress was to enjoy authority to “legislate in all Cases for the general Interests of the Union, and also in those Cases in which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation.”

AKHIL REED AMAR, *AMERICA’S CONSTITUTION* 108 n.* (2005) (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 131–32 (Max Farrand ed., 1911)); see also Akhil Reed Amar, *America’s Constitution and the Yale School of Constitutional Interpretation*, 115 YALE L.J. 1997, 2003 n.23 (2006) (reiterating the same point). One can also find increasing use of Resolution VI in briefs filed before the United States Court in cases involving the proper construction of federal power. See, e.g., Brief of Amicus Curiae Constitutional Accountability Center in Support of Appellees and Affirmance at 6, *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011) (No. 11-5047) 2011 WL; Brief of Amici Curiae State Legislators in Support of Defendants-Appellants at 3, 10–11, *U.S. Dept. of Health & Human Servs. v. Florida*, 648 F.3d 1235 (11th Cir. 2011) (Nos. 11-11021-HH, 11-11067-HH), 2011 WL 1461595 (arguing that court should use Resolution VI as a guide to interpreting the scope of federal power); Brief of Amicus Curiae Constitutional Accountability Center in Support of Appellant and Reversal at 4, *Virginia v. Sebelius*, 656 F.3d 253 (4th Cir. 2011) (Nos. 11-057, 11-1058), 2011 WL 792217 (same).

interests of the Union,” those “to which the States are separately incompetent” and those affecting national “harmony.”⁴ As described by most of its advocates, Resolution VI authorizes Congress to regulate all collective action problems of national importance.⁵

In support of their claims, Resolution VI scholars argue that the members of the Philadelphia Convention adopted the resolution and sent the same to the Committee of Detail with the expectation that the resulting text would be based on this overriding principle of national power, and that they accepted the text of Article I, Section 8 as the enactment of Resolution VI. These scholars also claim (or rely on the claim) that Philadelphia Convention member James Wilson publicly declared during the ratification debates that the framers based Article I, Section 8 on the principle of Resolution VI. A close reading of the historical sources, however, shows that the framers did not view Article I, Section 8 as having operationalized the general principle of Resolution VI and allowing federal action in all cases in which the “States are separately incompetent.”⁶ In fact, they *expressly* stated otherwise.⁷ Even more importantly, it turns out that there is no historical evidence that Resolution VI played any role whatsoever during the ratification debates. Claims to the contrary are based on an historical mistake.

As amended and ultimately adopted in the Philadelphia Constitution Convention, Resolution VI declared that Congress should have power “to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation.”⁸

According to the advocates of Resolution VI, power to “legislate . . . in those Cases where the States are separately incompetent” allows Congress to act in all cases affecting the national interest that involve “collective action problems” where states are unwilling or unable to act individually.⁹ In fact, according to Resolution VI, *any* subject

4 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS] (Journal of the Convention).

5 See, e.g., Cooter & Siegel, *supra* note 3, at 115.

6 2 FARRAND’S RECORDS, *supra* note 4, at 21.

7 See *infra* note 124 and accompanying text.

8 2 FARRAND’S RECORDS, *supra* note 4, at 131–32. The original Resolution VI did not include language referring to power to “legislate in all cases for the general interests of the Union.” Gunning Bedford successfully proposed the final amended language on July 17, 1787. See *id.* at 21.

9 See Balkin, *supra* note 3, at 12–13; Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1809 (2010); Cooter & Siegel, *supra* note 3, at 117; Koppelman, *supra* note 3, at 12–15.

affecting the “general Interests of the Union,” or which cannot “competently” be handled at a state level, or which affects the “Harmony of the United States” falls within the scope of federal power.¹⁰

Although briefly and unsuccessfully raised at the time of the New Deal,¹¹ the current advocacy of Resolution VI represents a new move in the ongoing debate over the proper scope of national regulatory authority. Under the interpretive principle announced by Resolution VI, courts should not be interpreting text and precedent in a manner that maintains a line between state and federal responsibilities. Instead, courts should simply determine whether the matter involves an issue of national importance beyond the “competency” of the individual states. Under this approach, all congressionally identified “collective action problems” by definition fall within the constitutional powers of Congress, regardless of subject matter and regardless of the intrusion into matters traditionally left to state control.¹²

If adopted, this approach would mark a dramatic departure from the current jurisprudence of the United States Supreme Court. For more than seventy years, the opinions of Chief Justice John Marshall in *McCulloch v. Maryland*¹³ and *Gibbons v. Ogden*¹⁴ have served as the

10 See Balkin, *supra* note 3, at 12–15.

11 Compare Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335, 1337–38, 1366 (1934) (arguing that courts should rely on Resolution VI), with *Carter v. Carter Coal Co.*, 298 U.S. 238, 257–58 (1936) (acknowledging Resolution VI only to reject it as a principle of constitutional interpretation). Although later New Deal Cases rejected the narrow view of federal power embraced by the majority of *Carter Coal*, no Supreme Court majority has ever accepted the invitation to rely on Resolution VI.

12 According to Andrew Koppelman, for example, “Congress has the authority to solve problems that the states cannot separately solve. It can choose any reasonable means to do that.” Koppelman, *supra* note 3, at 3. Similarly, Professor Jack Balkin claims that the Interstate Commerce Clause “gives Congress the ability to solve problems that it reasonably believes to exist.” Balkin, *supra* note 3, at 33. In an accompanying footnote, Balkin further clarifies that “a reasonableness test applies to two different questions: The first is whether there is a sufficient spillover effect, collective action problem, or other effect on interstate commerce to justify regulation. The second is whether Congress’s choice of regulation is sufficiently adapted to achieving its purposes in regulating.” *Id.* at 33 n.121. Although this appears to limit congressional power to matters involving “interstate commerce,” Balkin believes that “commerce” includes any “interaction,” whether social, commercial or otherwise, that affects the national interest. See *id.* at 15–29. Thus, any interaction occurring in the states that Congress reasonably views as affecting the nation as a whole would be subject to federal regulation. Under such a view, the text of the Constitution and judicial enforcement of the same plays no more than a trivial role.

13 17 U.S. (4 Wheat.) 316 (1819).

14 22 U.S. (9 Wheat.) 1 (1824).

foundation for judicial construction of federal power.¹⁵ John Marshall's interpretive approach in these two cases has proven capacious enough to justify the post-New Deal regulatory state¹⁶ while at the same time preserving the basic concept of limited and enumerated federal power.¹⁷ Although *McCulloch* is probably best known for its broad reading of the Necessary and Proper Clause,¹⁸ and *Gibbons* for its broad reading of commerce,¹⁹ both decisions expressly embraced the concept of limited, enumerated power and federalism-based reservations of local regulatory autonomy.²⁰ According to Marshall, "[t]he

15 Compare, e.g., *Hammer v. Dagenhart*, 247 U.S. 251, 269–70 (1918) (invalidating congressional regulation of local labor standards), with *United States v. Darby*, 312 U.S. 100, 113 (1941) (upholding the same with repeated citations to *Gibbons*). According to New Deal Justice Felix Frankfurter, Chief Justice Marshall's declaration in *McCulloch* that "it is a constitution we are expounding" was the "most important, single sentence in American Constitutional Law." DR. HARLAN B. PHILLIPS, FELIX FRANKFURTER REMINISCES 166 (Harlan B. Phillips ed., 1960). The contemporary Supreme Court continues to look to *McCulloch* and *Gibbons* as representing a particularly authoritative approach to interpreting Article I, Section 8. See, e.g., *United States v. Lopez*, 514 U.S. 549, 568 (1995) (Kennedy, J., concurring) (describing Chief Justice John Marshall's decision in *Gibbons* as "an early and authoritative recognition that the Commerce Clause grants Congress extensive power and ample discretion to determine its appropriate exercise").

16 See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 120 (1942) ("[*Gibbons*] described the federal commerce power with a breadth never yet exceeded.").

17 See *Gibbons*, 22 U.S. (9 Wheat.) at 203 ("Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State" are but a small part "of that immense mass of legislation . . . not surrendered to the general government."); see also, *United States v. Lopez*, 514 U.S. 549, 566 (1995) (citing both *McCulloch* and *Gibbons* as presenting a limited vision of federal power which reserves areas of local or state regulatory autonomy).

18 *McCulloch*, 17 U.S. (4 Wheat.) at 421 ("Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.")

19 *Gibbons*, 22 U.S. (9 Wheat.) at 193 ("To what commerce does this power extend? The Constitution informs us, to commerce 'with foreign nations, and among the several States, and with the Indian tribes.' It has, we believe, been universally admitted, that these words comprehend every species of commercial intercourse between the United States and foreign nations.") (quoting U.S. CONST. art. I, § 8, cl. 3)).

20 For a general discussion of Marshall's view of broad yet limited enumerated federal power, see III–IV G. EDWARD WHITE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815–35, at 541–67 (Paul A. Freund & Stanley A. Katz eds., 1988). By "federalism," I refer to entrenched and judicially enforceable distinctions between matters local and matters national. See *id.* at 566 (discussing Marshall's view of the Court's role in limiting the scope of enumerated federal power and preserving the line between state and national power). It is important to distinguish constitutional federalism from the related prin-

enumeration presupposes something not enumerated,”²¹ and in both *McCulloch* and *Gibbons* he suggested a number of subjects and legal categories that remained beyond the legitimate reach of Article I, Section 8’s limited delegation of federal authority.²² This “flip side” to Marshall’s otherwise generous reading of federal power informs the current Supreme Court’s limited reading of the Interstate Commerce Clause²³ and its preservation of areas traditionally left to the exclusive control of the states.²⁴ This reading of federal power reflects a principle that extends back to the ratification of the Constitution. As James Madison explained in *Federalist No. 14*, “the general government is not to be charged with the whole power of making and administering

ciple of subsidiarity that suggests leaving regulatory control at the lowest efficient level. Subsidiarity is not a doctrine of entrenched constitutional principle but one that leaves the ultimate decision of regulatory control in the hands of national political majorities and counsels judicial deference to the same. See Stephen Breyer, *Making Our Democracy Work: The Yale Lectures*, 120 YALE L.J. 999, 2024 (2011) (distinguishing federalism from the related idea of “subsidiarity,” and describing the latter as “the idea of placing authority to carry out a particular public task in the hands of the smallest unit able effectively to perform it”). Thus, while advocates of Resolution VI sometimes speak as if they are preserving a distinction between national and local authority, the distinction is left in the hands of national political majorities. See *supra* note 12.

21 *Gibbons*, 22 U.S. (9 Wheat.) at 195.

22 See *Gibbons*, 22 U.S. (9 Wheat.) at 203 (“[Inspection laws] form a portion of that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass.”); *McCulloch*, 17 U.S. (4 Wheat.) at 411 (noting that a “great substantive and independent power” such as levying taxes required express enumeration and “cannot be implied as incidental to other powers, or used as a means of executing them”); *id.* at 423 (indicating that the Court would invalidate any pretextual use of congressional power “for the accomplishment of objects not entrusted to the government”).

23 See, e.g., *United States v. Lopez*, 514 U.S. 549, 566 (1995) (citing Marshall’s reasoning in *McCulloch* and *Gibbons* in support of federalism-protective rules of constitutional construction).

24 See *United States v. Morrison*, 529 U.S. 598, 616 n.7, 617–18 (2000) (citing the state regulatory autonomy language of *Gibbons* and repeating the assertion in *Lopez* that proper construction of federal power “requires a distinction between what is truly national and what is truly local”); see also *United States v. Comstock*, 130 S. Ct. 1949, 1967–68 (2010) (Kennedy, J., concurring) (discussing the Court’s Necessary and Proper jurisprudence, including the decision in *McCulloch* and concluding “[i]t is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause; if so, that is a factor suggesting that the power is not one properly within the reach of federal power”).

laws. Its jurisdiction is limited to certain enumerated objects.”²⁵ Thus, as broad as contemporary judicial construction of federal power may be, the mere failure of individual state action on an issue of national interest (a so-called “collective action problem”) cannot by itself justify an assertion of federal authority unless that authority can be derived from the textual enumeration of Article I, Section 8 in a manner that preserves areas of judicially protected state autonomy.²⁶

Given the long-standing principle of enumerated power, the traditional limited reading of cases like *McCulloch* and *Gibbons*, and the fact that Resolution VI is not part of the Constitution, advocates of Resolution VI carry a heavy persuasive burden if they wish to establish an altogether new principle of national power.²⁷ The claim most commonly made on behalf of Resolution VI is that it represents a principle embraced by the Framers themselves.²⁸ According to this argument,

25 THE FEDERALIST NO. 14, at 102 (James Madison) (Clinton Rossiter ed., 1961).

26 The clearest example of this would be the Court’s decision to invalidate the take-title provisions of the Low-Level Radioactive Waste Policy Act in *New York v. United States*, 505 U.S. 144, 174–77 (1992), despite the fact that Congress was responding to a failure of individual states to make provision for the storage of hazardous waste, thus creating a national problem of interstate movement of hazardous waste. Here is how Justice Kennedy recently summarized the Supreme Court’s long-standing embrace of both federalism and broad federal power:

It is correct in one sense to say that if the National Government has the power to act under the Necessary and Proper Clause then that power is not one reserved to the States. But the precepts of federalism embodied in the Constitution inform which powers are properly exercised by the National Government in the first place. It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause; if so, that is a factor suggesting that the power is not one properly within the reach of federal power.

United States v. Comstock, 130 S. Ct. 1949, 1967–68 (2010) (Kennedy, J., concurring) (citations omitted).

27 Although advocates of Resolution VI do not seek to overrule cases like *McCulloch* and *Gibbons*, the general claim is that both these precedents and the text of Article I, Section 8 should be read in a manner that effectuates the principle of Resolution VI. See, e.g., Balkin, *supra* note 3, at 33 & n.121; Cooter & Siegel, *supra* note 3, at 180–81; Koppelman, *supra* note 3, at 18. The *principle* thus takes primacy of place.

28 All of the sources cited in note 3, *supra*, rely, either in whole or in part, on a theory of original framers’ intent. The reliance is inevitable given the fact that only the framers in the Philadelphia Convention *knew* about Resolution VI at the time of the Founding. Even Cooter and Siegel, who otherwise focus on instrumentalist reasons for adopting the principle of Resolution VI, nevertheless argue that the principle is grounded in the original intention of the framers. See Cooter & Siegel, *supra* note 3, at 121 (“The structure of governance established by the Articles of Confederation often prevented the states from acting collectively to pursue their common interests.

the members of the Philadelphia Constitutional Convention adopted Resolution VI and sent the same to the Committee of Detail with the expectation that the resulting constitutional text would operationalize the Convention’s adopted understanding of the proper scope of national power.²⁹ Because Resolution VI represented framers’ understanding of the proper scope of national power, courts may legitimately rely on Resolution VI as an interpretive guide to constructing the delegated powers of Article I.³⁰

In some ways, this is a surprising argument. Very few scholars today accept the search for framers’ intent as a persuasive or even workable approach to constitutional interpretation.³¹ Original intent originalism has been subjected to a withering line of scholarly criticism for more than two decades and has been abandoned by most contemporary originalist constitutional theorists.³² Not only is it difficult to identify an aggregated “intent,” there seems to be little norma-

Solving these problems of collective action was a central reason for calling the Constitutional Convention. These facts bear on the proper interpretation of the constitution that emerged from the Convention”) (footnotes omitted).

29 See Balkin, *supra* note 3, at 8–11; Koppelman, *supra* note 3, at 12; Stern, *supra* note 11, at 1340.

30 See, e.g., Balkin, *supra* note 3, at 12 (“The list of enumerated powers was designed so that the new federal government would have power to pass laws on subjects and concerning problems that are *federal* by nature; that is, problems that require a federal solution, as opposed to *national* problems that occur in many places, but that do not require coordinated action and a single approach. This is the key insight of Resolution VI, and it is still true to this day.”); Koppelman, *supra* note 3, at 12 (suggesting that, rather than enforce a distinction between economic and non-economic activity, “[a] better rule would implement the line that the Framers of the Constitution drew”); Stern, *supra* note 11, at 1366 (“The Court can avoid the possibility of placing the nation in a defenseless position by returning to the original conception of the commerce clause”). This is not to say that all Resolution VI advocates themselves are wedded to the methodology of original framers’ intent originalism. For example, in his recent book, Jack Balkin distinguishes his structural arguments from those based on original public meaning, original understanding, or original intent. See BALKIN, *supra* note 3, at 906–07. Like other Resolution VI advocates, however, Balkin insists that the framers intended Article I, Section 8 to be the textual enactment of Resolution VI. See *infra* notes 94, 142 and accompanying text.

31 See Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, in THE CHALLENGE OF ORIGINALISM 12, 12 (Grant Huscroft & Bradley W. Miller eds., 2011); see also Larry Alexander & Saikrishna Prakash, “Is That English You’re Speaking?” *Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 976 (2004) (“Whenever someone reads the Constitution or any other text, he explicitly or implicitly does so with an author in mind. And he has no choice but to do so.”).

32 See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204–05 (1980); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 885–86 (1985).

tive justification for judicial entrenchment of the framers intent, however determined.³³ The framers themselves, for example, rejected such an idea and sought to keep their deliberations secret.³⁴ Thus, any argument in support of Resolution VI which is based on original framers' intent carries the double burden of both proving this was the actual intent of the framers and establishing that this is a normatively attractive approach to interpreting the text of the Constitution.³⁵

The form of originalism currently employed by most originalist theorists seeks the *original public meaning* of the text.³⁶ Not only does this approach avoid a number of methodological and normative difficulties associated with original intent originalism, it also appears to be the originalist theory adopted by a majority of the current Supreme Court.³⁷ Under this approach, evidence of framers' intent could be used as evidence of how words and phrases were publicly used and understood at the time of ratification.³⁸ The best evidence, however, would show how the ratification debates included discussion (and acceptance) of Resolution VI as the operative principle behind Article I, Section 8. For example, Yale Professor Jack Balkin has recently claimed that, during the ratification debates, framer James Wilson publicly declared that the framers intended Resolution VI to serve as the underlying principle of Article I, Section 8.³⁹ If Wilson actually made such an argument, such evidence allows a case to be made in terms of original public understanding and not just (potentially secret) framers' intent.⁴⁰

33 See *supra* note 32; see also Solum, *supra* note 31, at 17–19 (discussing criticism of original intent originalism).

34 See JACK N. RAKOVE, ORIGINAL MEANINGS 13 (1996).

35 As pointed out in note 30, *supra*, although not all Resolution VI advocates embrace the theory of original intent originalism, all rely on arguments based at least in part on claims of original framers' intent.

36 See Solum, *supra* note 31, at 22–23.

37 See *District of Columbia v. Heller*, 554 U.S. 570, 585 (2008); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010) (applying *Heller's* holding on the Second Amendment to the states through the Fourteenth Amendment).

38 All original intent theorists believe this by definition, and all public meaning originalists accept that framers' usage may be evidence of contemporary semantic meaning, even if not conclusive evidence. See Solum, *supra* note 31, at 19–20.

39 See Balkin, *supra* note 3, at 8–9; see also *infra* note 146 and accompanying text (highlighting the Wilson argument).

40 Balkin himself does not expressly make such an argument, though he does claim Resolution VI was discussed during the ratification debates, and Wilson's speech is the only evidence Balkin cites as involving a discussion of Resolution VI during the ratification debates. See *infra* note 148 and accompanying text; see also BALKIN, *supra* note 3, at 1217 ("The framers and ratifiers may have stated a wide vari-

In fact, James Wilson made no such claim about Resolution VI. Balkin’s assertion to the contrary is based on an error of historical fact.⁴¹ It turns out that Resolution VI was never once discussed during the ratification debates.⁴² As far as the Philadelphia framing debates are concerned, the members themselves *expressly denied* that the adoption of Article I, Section 8 had the effect of granting Congress the power to act in cases of national importance where “the states are separately incompetent.”⁴³ Advocates of Resolution VI have completely missed this critical post-Article I, Section 8 discussion of national power. Thus, even if one can solve the problems of original intent originalism, there is no evidence that either the framers or the ratifiers believed that Resolution VI continued to operate in principle or in fact following the adoption of Article I, Section 8.

Part I of this article explores the history of Resolution VI during the framing debates in the Philadelphia Constitutional Convention. Part II considers and clarifies the theories of Resolution VI advocates, including those based on both original intent and original meaning. Part III considers whether the evidence supports a claim that the framers intended Resolution VI to inform the construction of federal power under Article I, Section 8. Finally, Part IV considers the claim that Resolution VI became part of the public debate as state conventions considered whether to ratify the proposed Constitution.

ety of principles at various levels of scope and generality, or they may have stated no principles at all that have come down to us. The proper question, however, is what principles we should ascribe to the text the *framers and ratifiers* made into law.” (emphasis added)). Thus, although Balkin distances himself from arguments based on original meaning and original intent, he is clearly relying on what readers will perceive as an argument based at least in part on original intent and original understanding originalism. See, e.g., Cooter & Siegel, *supra* note 3, at 120 n.8 (describing Balkin’s discussion of power to address collective action problems in his *Commerce* article as “especially concerned with the original public meaning of the Commerce Clause”); Elizabeth B. Wydra, *An Originalist Defense of Health Care Reform*, CONSTITUTIONAL ACCOUNTABILITY CENTER (Mar. 8, 2011), <http://www.theusconstitution.org/blog/history/?p=2824> (describing the author’s brief in *Virginia v. Sebelius* and its Balkin-inspired description of Resolution VI as making an argument about the “original meaning” of the Commerce and Necessary and Proper Clauses). However Wilson’s speech fits into Balkin’s actual theory of constitutional interpretation, there is no evidence that Wilson said anything about Resolution VI during the ratification debates. See *infra* note 158 and accompanying text.

41 See *infra* Part IV.A.

42 See *infra* Part IV.

43 See *infra* Part III.B.

I. THE HISTORY OF RESOLUTION VI

A. *May, 1787*

Resolution VI was part of the Virginia Plan submitted to the Philadelphia Constitutional Convention by Virginia delegate Edmund Randolph on May 29, 1787. The original sixth resolution of that Plan stated in part:

[T]he National Legislature ought to be [e]mpowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation⁴⁴

The members first discussed Resolution VI on May 31, 1787.⁴⁵ Charles Pinckney and John Rutledge both “objected to the vagueness of the term *incompetent*, and said they could not well decide how to vote until they should see an exact enumeration of the powers comprehended by this definition.”⁴⁶ South Carolina delegate Pierce Butler feared that “we were running into an extreme in taking away the powers of the States,” and he asked Edmund Randolph to explain “the extent of his meaning.”⁴⁷

In response, Randolph “disclaimed any intention to give indefinite powers to the national Legislature” and insisted that “he was entirely opposed to such an inroad on the State jurisdictions.”⁴⁸ However, it was too early in the debates to try and specify the proposed powers of the national government. According to Randolph, “it would be impossible to define the powers and the length to which the federal Legislature ought to extend *just at this time*.”⁴⁹ According to

44 1 FARRAND’S RECORDS, *supra* note 4, at 21. The full text of the original resolution read:

Resolved that each branch ought to possess the right of originating Acts; that the National Legislature ought to be [e]mpowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation; to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union; and to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof.

Id.

45 *Id.* at 53 (Madison’s notes).

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.* at 60 (Pierce’s notes) (emphasis added).

James Madison, the convention had been "wandering from one thing to another without seeming to be settled in any one principle."⁵⁰ For the convention to move forward, Madison advised, "it was necessary to adopt some general principles on which we should act."⁵¹ The assembly quickly disposed of the matter and voted 9-0 (with one state delegation split) in favor of "giving powers, in cases to which the States are not competent" and accepted the additional clauses "giving powers necessary to preserve harmony among the States" "with[ou]t debate or dissent."⁵²

B. July, 1787

It was not until mid-July, more than a month later, when the Convention returned to Resolution VI and discussed federal power "to legislate in all cases to which the separate States are incompetent; or in which the harmony of the U.S. may be interrupted by the exercise of individual legislation."⁵³ By that time, the Convention had debated and settled some of the most critical issues of the Convention. The New Jersey Plan, which proposed only a minor increase in federal power, had been debated and rejected.⁵⁴ Likewise, Alexander Hamilton's "British Plan"⁵⁵ which envisioned a complete consolidation of the states into a single national government had been debated and subsequently ignored in favor of the "first plan" (Virginia's).⁵⁶ The

50 *Id.*

51 *Id.* In fact, at this point Madison was growing increasingly doubtful about the "practicability" of an "enumeration and definition of the powers necessary to be exercised by the national Legislature." *Id.* at 53 (Madison's notes).

52 *Id.* at 53-54.

53 2 FARRAND'S RECORDS, *supra* note 4, at 17 (Madison's notes).

54 1 FARRAND'S RECORDS *supra* note 4, at 322 (Madison's notes).

55 *Id.* at 282-93 (Madison's notes). Hamilton himself viewed his plan as suggested "amendments" to the Virginia Plan. *See id.* at 291 (Madison's notes).

56 *Id.* at 327 (Yate's notes). Hamilton's plan expressly called for the erasure of state sovereignty. *See id.* at 283 (Madison's notes) ("[N]o amendment of the confederation, leaving the States in possession of their sovereignty could possibly answer the purpose."); *id.* at 323 (Madison's notes) ("By an abolition of the States, he meant that no boundary could be drawn between the National & State Legislatures; that the former must therefore have indefinite authority. If it were limited at all, the rivalry of the States would gradually subvert it. . . . As States, he thought they ought to be abolished."). In fact, a number of members rejected the idea that the states had ever enjoyed independent sovereign status. *See, e.g., id.* at 323-24 ("Mr. King . . . doubted much the practicability of annihilating the States; but thought that much of their power ought to be taken from them."); *id.* at 324 ("Mr. Wilson, could not admit the doctrine that when the Colonies became independent of G. Britain, they became independent also of each other. He read the declaration of Independence, observing thereon that the *United Colonies* were declared to be free & independent States; and

greatest symbol of the Convention's commitment to following a course somewhere between complete nationalism and mere confederation was the adoption of the "great compromise" which apportioned the House by population but provided states equal representation in the Senate.⁵⁷ With the stumbling block of representation now behind them, the assembly could now move towards defining the proposed powers of the federal government.

On July 16th, the Convention resumed its discussion of Resolution VI. Starting where he had left off, Pierce Butler "call[ed] for some explanation of the extent of this power; particularly of the word *incompetent*. The vagueness of the terms rendered it impossible for any precise judgment to be formed."⁵⁸ Echoing earlier counsels of patience, Massachusetts delegate Nathaniel Gorham replied that the time for precision had not yet come and that, until it did, it was better to leave the principle undefined. As Gorham explained, "[t]he vagueness of the terms constitutes the propriety of them. We are now establishing general principles, to be extended hereafter into details which will be precise & explicit."⁵⁹

John Rutledge chaffed at the continued delay and "urged the objection started by Mr. Butler and moved that the clause be should be committed to the end that a specification of the powers comprised in the general terms, might be reported."⁶⁰ This time, Rutledge and Butler had more members on their side. The vote on Rutledge's motion to recommit ended in a tie, 5-5,⁶¹ which had the effect of maintaining the status quo. It was clear, however, that after more than a month there was a growing desire to define the powers of the national government.⁶²

inferring that they were independent, not *Individually* but *Unitedly* and that they were confederated as they were independent, States."); see also *id.* ("Col. Hamilton, assented to the doctrine of Mr. Wilson.").

57 For a discussion of the compromise over representation and its importance to the success of the convention, see RAKOVE, *supra* note 34, at 53-93.

58 2 FARRAND'S RECORDS, *supra* note 4, at 17 (Madison's notes).

59 *Id.* In his notes, Madison spells Gorham's name "Ghorum."

60 *Id.* In his notes, Madison spells Rutledge's name "Rutldidge."

61 *Id.*

62 According to Jack Rakove, even though the vote ended in a stalemate and the continuation of the status quo, the fact that there were now five votes in favor of replacing the Resolution with a list of enumerated powers "already pointed to the course debate would take." See RAKOVE, *supra* note 34, at 178.

1. Roger Sherman’s Proposal

The next day, on July 17th, Connecticut’s Roger Sherman moved to replace the wording of Resolution VI with the following:

To make laws binding on the People of the United States in all cases which may concern the common interests of the Union: but not to interfere with the government of the individual States in any matters of internal police which respect the government of such States only, and wherein the general welfare of the United States is not concerned.⁶³

This was not so much an amendment as it was a complete revision of Resolution VI. The original proposal said nothing about power to regulate for “the common interest.” Resolution VI instead limited congressional power to those matters beyond the “competency” of the states or which somehow threatened national “harmony.” Also, there had been nothing in Resolution VI about *limiting* such power in order to protect the retained powers of the states in matters of “internal police.” Sherman’s proposal amounted to an altogether different formulation of the principle that should guide the ultimate division of state and federal powers.

James Wilson immediately seconded Sherman’s proposal and described the new language “as better expressing the general principle.”⁶⁴ Mr. Morris, on the other hand, opposed Sherman’s language on the ground that States would claim independent police powers that “*ought* to be infringed in many cases.”⁶⁵

Morris’s objection prompted Sherman to clarify the scope of federal power under his amended Resolution. Accordingly, “in explanation of his ideas,” Sherman “read an enumeration of powers, including the power of levying taxes on trade, but not the power of *direct taxation*.”⁶⁶ Morris pounced on this omission and wryly suggested that, since taxes on consumption would be deficient, “it must have been the meaning of Mr. Sherman, that the Genl. Govt. should recur to quotas & requisitions, which are subversive of the idea of Govt.”⁶⁷ Finding himself on the defensive, Sherman conceded that “[s]ome provision . . . must be made for supplying the deficiency of other taxation, but he had not formed any.”⁶⁸

63 2 FARRAND’S RECORDS, *supra* note 4, at 21 (Journal), 25 (Madison’s notes).

64 *Id.* at 26 (Madison’s notes).

65 *Id.* (emphasis added).

66 *Id.*

67 *Id.*

68 *Id.*

According to Jack Rakove, Sherman's fellows probably considered such an omission to be "a fatal defect" in his plan.⁶⁹ Sherman's proposed amendment to Resolution VI failed on a vote of 2-8, with Wilson joining the Pennsylvania delegation's negative vote.⁷⁰

2. Gunning Bedford's Amendment

Immediately following Sherman's failed amendment, Delaware delegate Gunning Bedford moved to alter the language of Resolution VI so that it read: "[T]o legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, . . . or in which the harmony of the U. States may be interrupted by the exercise of individual Legislation."⁷¹

Edmund Randolph, who originally submitted Resolution VI, was uncomfortable with the suggested change since "[i]t involves the power of violating all the laws and constitutions of the States, and of intermeddling with their police. The last member of the sentence is (also) superfluous, being included in the first."⁷² Bedford responded that the change did not amount to any expansion of federal power over that of Randolph's original proposal.⁷³ As Bedford explained, since Randolph's proposal anticipated that "*no State being separately competent to legislate for the general interest of the Union,*" Bedford's own proposal was not "more extensive or formidable than the clause as it stands."⁷⁴ The record does not reflect any discussion of Randolph's point regarding the "superfluous" control of matters affecting the "harmony" of the United States. Instead, the convention passed Bedford's motion to amend the language of Resolution VI by a single vote (6-4).⁷⁵ Next, the convention voted on Bedford's proposed language, which passed on a vote of 8-2.⁷⁶

This was the final discussion of Resolution VI before the assembly sent the language to the Committee of Detail on July 23, 1787.⁷⁷ What emerged from that Committee is the familiar list of enumerated powers contained in Article I, Section 8. Resolution VI was never men-

69 RAKOVE, *supra* note 34, at 81.

70 2 FARRAND'S RECORDS, *supra* note 4, at 26 (Madison's notes).

71 *Id.*

72 *Id.*

73 *Id.* at 27.

74 *Id.*

75 *Id.*

76 *Id.*

77 See *id.* at 95-96 (Madison's notes). The Committee consisted of Oliver Ellsworth (CT), Nathaniel Gorham (MA), Edmund Randolph (VA), John Rutledge (SC), and James Wilson (PA). *Id.* at 97 (Journal).

tioned again during the Convention, nor was the Resolution mentioned at any time during the ratification debates. The proceedings of the Convention were kept secret at the time and were not made public for several decades.⁷⁸ Accounts of the Convention proceedings and the submission of Resolution VI of the Virginia Plan first appeared in 1821 with the publication of Convention Secretary William Jackson’s *Journal of the Convention*.⁷⁹ The first constitutional treatise by St. George Tucker makes no mention of Resolution VI,⁸⁰ and, to the extent that the Resolution is mentioned in later nineteenth century treatises, it is only as part of the story of the Convention and is never presented as a principle or rule for interpreting federal power.⁸¹

No eighteenth or nineteenth century state or federal judicial opinion mentions Resolution VI. In fact, Resolution VI does not first appear in the U.S. Reports until more than a century later when cited in a 1908 dissent by Justice William Henry Moody.⁸² Justice Oliver Wendell Holmes may have referred to Resolution VI in the 1920 case *Missouri v. Holland*,⁸³ but no Supreme Court majority clearly refers to

78 See RAKOVE, *supra* note 34, at 13.

79 3 JAMES MADISON, THE WRITINGS OF JAMES MADISON, COMPRISING HIS PUBLIC PAPERS & HIS PRIVATE CORRESPONDENCE, INCLUDING HIS NUMEROUS LETTERS & DOCUMENTS NOW FOR THE FIRST TIME PRINTED (Gaillard Hunt ed., 1900), available at http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=1935&chapter=118621&layout=html&Itemid=27 (last visited Mar. 7, 2012).

80 See 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND THE COMMONWEALTH OF VIRGINIA, app. D (Augustus M. Kelley 1969) (1803).

81 For example, in his Commentaries, Joseph Story mentions Resolution VI only as part of his discussion regarding the origins of the power tax for the general welfare—language that Story believed was borrowed from Resolution VI. See 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 925 (Fred. B. Rothman & Co. 1991) (1833). Story says nothing about Resolution VI serving as a principle for understanding delegated federal power. Other early treatises say nothing at all about Resolution VI. See, e.g., PETER DU PONCEAU, A BRIEF VIEW OF THE CONSTITUTION OF THE UNITED STATES (1834); 1–4 JAMES KENT, COMMENTARIES ON AMERICAN LAW (Legal Classics Library 1986) (1826–1830); see also WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 79 (William S. Hein Co., Inc. 2003) (2d ed. 1829) (“The enumerated powers, which we now proceed to consider, will be all found to relate to, and be consistent with, the main principle; the common defen[se] and general welfare.”).

82 The Emp’rs Liab. Cases, 207 U.S. 463, 521 (1908) (Moody, J., dissenting).

83 252 U.S. 416, 433 (1920) (“What was said in that case with regard to the powers of the States applies with equal force to the powers of the nation in cases where the States individually are incompetent to act.”).

Resolution VI until 1936 and the decision in *Carter v. Carter Coal Co.*⁸⁴ when the Court raised the Resolution only to dismiss it as a reliable guide to constitutional interpretation.⁸⁵

Of the framers themselves, we have but one available comment on the convention's use of Resolution VI, that of James Madison. Writing in response to John Taylor's 1833 accusation of a secret plan in the Philadelphia Convention to eradicate the sovereign existence of the states—an accusation based in part on revelations regarding the convention's adoption of Resolution VI—Madison explained:

Let it next be seen what were the powers proposed to be lodged in the Govt. as distributed among its several Departments.

The Legislature, each branch possessing a right to originate acts, was to enjoy 1. the *Legislative* rights vested in the Congs. of the Confederation, (This must be free from objection, especially as the powers of that description were left to the selection of the Convention.

2. cases to which the several States, would be incompetent or in which the harmony of the U. S. might be intercepted by individual Legislation. (*It can not be supposed that these descriptive phrases were to be left in their indefinite extent to Legislative discretion.* A selection & definition of the cases embraced by them was to be the task of the Convention. If there could be any doubt that this was intended, & so understood by the Convention, it would be removed by the course of proceeding on them as recorded, in its Journal. many of the propositions made in the Convention, fall within this remark: being, as is not unusual general in their phrase, but if adopted to be reduced to their proper shape & specification.⁸⁶

According to Madison, Resolution VI was no more than a placeholder of sorts, adopted with the expectation that its scope would be later defined through the adoption of a list of enumerated powers.⁸⁷ In this way, the scope of federal power would not be left to "Legislative discretion."

84 298 U.S. 238 (1936).

85 *Id.* at 292. See also Brief for the United States at 94 n.41, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (Nos. 854, 864), 1934 WL 31976, at 94–96 n.41 (discussing Resolution VI and its later clarification).

86 See 3 FARRAND'S RECORDS, *supra* note 4, app. A at 526–27 (quoting a letter from James Madison to John Taylor that "appears was not sent") (second emphasis added).

87 Madison's letter seems to capture the broad sense of the framers, even if Madison himself entertained "doubts" about the "practicability" of enumeration early in the Convention. See 1 FARRAND'S RECORDS, *supra* note 4, at 53 (Madison's notes) ("Mr. Madison said that he had brought with him into the Convention a strong bias in favor of an enumeration and definition of the powers necessary to be exercised by the national Legislature; but had also brought doubts concerning its practicability. His

II. CURRENT THEORIES OF “RESOLUTION VI”

Despite the lack of textual inclusion and historical reliance, a growing number of contemporary constitutional scholars claim that Resolution VI ought to inform the proper interpretation of constitutionally enumerated federal powers. The interpretive method by which Resolution VI is brought to bear on contemporary issues of federal power varies. Some scholars adopt a purely instrumentalist methodology and use Resolution VI as representing an early and wise approach to determining the scope of national power, regardless of the original understanding of the Constitution.⁸⁸ Others scholars claim that Resolution VI somehow informed the original meaning of the text itself. Some scholars in this latter group rely on original framers’ intent, while others rely on a combination of original framers’ intent and original public understanding. I will analyze each of these originalist approaches in detail below. Before doing so, however, it is important to understand how none of these approaches actually involve an interpretation of the actual *text* of the Constitution.

A. *Textual Meaning v. Textual Construction*

One of the major advances in current originalist methodology involves the distinction between the determining the semantic *meaning* of a text and determining the *legal effect* of that text.⁸⁹ The former involves an effort of textual interpretation and the latter involves the application of a rule of construction. Both textual meaning and possible construction or application may have been part of the discussion surrounding the adoption of a text. Nevertheless, determining the textual meaning of the words is not the same thing as determining how those words, once understood, should be applied in a particular legal dispute.

This distinction between interpretation and construction has a long history in law⁹⁰ and it was well understood by Founding-era constitutional theorists.⁹¹ Construction generally comes into play in situa-

wishes remained unaltered; but his doubts had become stronger. What his opinion might ultimately be he could not yet tell.”).

88 See, e.g., Cooter & Siegel, *supra* note 3, at 123.

89 See generally Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 100–08 (2010) (explaining the difference between meaning and construction).

90 See Lawrence B. Solum, *Semantic Originalism* 13–24 (Ill. Pub. Law & Legal Theory Res. Papers Series, Paper No. 07-24, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244 (last visited Mar. 10, 2012).

91 See, e.g., JOHN TAYLOR, CONSTRUCTION CONSTRUED AND CONSTITUTIONS VINDICATED 21–23 (Lawbook Exch. 1998) (1820); see also Kurt T. Lash, *Leaving the*

tions where a degree of textual meaning can be assigned, but some remaining aspects of the text remain ambiguous or vague, at least in terms of how the text might apply in particular case.⁹² So, for example, we might be able to identify a certain non-controversial core meaning to the phrase “commerce among the several states” (such as the movement of commercial products from one state to another), but not know with certainty whether commercially-produced air pollution which moves across state lines falls within the original understanding of the text. Applying the text to this latter situation requires an act of *construction*. Construction of a text cannot contradict the identified core textual meaning of a text, but the construction itself is not itself part of that identified textual meaning.

B. *The Claims of Resolution VI Advocates*

Defining the difference between meaning and construction may seem an odd detour into linguistic theory, but it is an important distinction. It is not always clear whether Resolution VI theorists are making claims about the meaning of constitutional text, or the proper construction or application of constitutional text. Andrew Koppelman, for example, claims that Resolution VI was “*translated* by the Committee of Detail into the present enumeration of powers in Article I, Section 8, which was accepted as a *functional equivalent* by the Convention without much discussion.”⁹³ Similarly, Jack Balkin claims that “the purpose of enumeration was not to *displace* the principle [of Resolution VI] but to *enact* it.”⁹⁴ These appear to be strong claims regarding the relationship between the principle of Resolution VI and the meaning of Article I, Section 8. If taken at full value, such claims appear to present a “replacement theory” whereby the text of Article I, Section 8, because it carries the *same meaning* as Resolution VI, can simply be *replaced* by Resolution VI, with no loss of meaning.⁹⁵

Chisholm *Trail: The Eleventh Amendment and the Background Principle of Strict Construction*, 50 WM. & MARY L. REV. 1577, 1604 (2009) (discussing, among other things, Founding period concerns about unduly broad “constructions” of constitutional text).

92 See Solum, *supra* note 90, at 87 (discussing how “construction is required” when “meaning runs out”).

93 Koppelman, *supra* note 3, at 12 (emphases added).

94 Balkin, *supra* note 3, at 11.

95 Here, I refer to “meaning” as “textual meaning.” See Solum, *supra* note 90, at 2–3 (discussing the possible meanings of “meaning”). It is possible that the assertion “Article I, Section 8 *means* Resolution VI” is not a claim of textual meaning, but is instead a claim regarding the teleological *purpose* of Article I, Section 8. *Id.* (emphasis added). If so, then this is a claim of original intent that I address in the next section.

If these scholars are claiming that the text of Article I, Section 8 literally (textually) *means* Resolution VI, then their claims are simply implausible. Whatever role Resolution VI played in the drafting and adoption of the text of Article I, Section 8, it cannot serve as the *textual meaning* of Article I, Section 8. No matter how hard one tries, one cannot plausibly conclude, for example, that the words “no Appropriation of Money to that Use shall be for a longer Term than two Years”⁹⁶ literally *means* “[Congress shall have power] to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.”⁹⁷ No doubt, one could build an argument explaining how this restriction on appropriations is *consistent* with the principle announced in Resolution VI. But then, one can derive the textual meaning of the military funding Clause without any recourse to Resolution VI whatsoever. In fact, it is difficult to see how Resolution VI in such a case provides any additional *textual meaning* whatsoever. For those who continue to resist this point, flip it around—if we sent Resolution VI to a thousand linguists around the world and asked them to translate the text into their native language, is it possible that any of them would produce a text meaning “no appropriation of money to that use shall be for a longer term than two years” (as would be true if this actually were a “translation”)?

This may seem an obvious and trivial point, but it illustrates what scholars likely mean when they claim that Article I, Section 8 is the “translation,” “functional equivalent,” or “the enactment” of Resolution VI. What they probably mean is that Article I, Section 8 represents the framers’ *conception* of the general principle (or concept) of federalism announced in Resolution VI.⁹⁸ In cases where the meaning of a particular text (or conception) remained ambiguous or unclear (which is probably *not* the case with the military funding clause), any additional construction or application of the text should be *consistent* with the general principle or concept from which the text was derived.

Understood this way, Resolution VI advocates might be understood as making a fairly common move in terms of constitutional con-

96 U.S. CONST. art. I, § 8, cl. 12.

97 2 FARRAND’S RECORDS, *supra* note 4, at 21 (Journal).

98 I am using the concept-conception to mean that Resolution VI represents a contested concept, with Article I, Section 8 representing the Convention’s conception of the broader concept. See, e.g., Lawrence B. Solum, *Legal Theory Lexicon: Concepts & Conceptions*, LEGAL THEORY BLOG (Jan. 2, 2011, 10:16 AM), <http://lsolum.typepad.com/legaltheory/2011/01/legal-theory-lexicon-concepts-conceptions.html>.

struction. American legal and political literature is thick with claims that the Constitution as a whole, or particular clauses, should be construed to reflect broader principles, such as those contained in the Preamble, or in the Declaration of Independence.⁹⁹ But such claims are brought to bear only in cases where the semantic meaning of a text is not clear. No one calls on the Preamble or the Declaration of Independence to determine the textual meaning of “each Senator shall have one Vote.”¹⁰⁰ Similarly, in our case, Resolution VI advocates are not calling on the court to use the Resolution to determine the meaning of textually clear provisions such as the two-year military funding restriction. Instead, the Resolution is called upon to assist the court in construing the contested meaning of clauses such as those empowering Congress to “regulate Commerce . . . among the several States.”¹⁰¹ Rules of construction apply in cases where the textual meaning is *not clear*.

But the principle of federal power supposedly represented by Resolution VI is only one of many possible principles or rules of construction that might be brought to bear in applying the text of Article I, Section 8 to a legal dispute. Other rules include federalist rules of “strict construction,”¹⁰² or institutional rules of judicial deference,¹⁰³ or rules that maximize particular conceptions of liberty.¹⁰⁴ Choosing Resolution VI (whatever *its* meaning) over other possible rules of construction requires a normative theory that justifies the use of Resolution VI. According to most Resolution VI advocates, the fact that the Resolution reflects the original intention of the framers and possibly the original public understanding of Article I, Section 8 gives us good reason use that principle as guide to contemporary construction of federal power.¹⁰⁵ In the next section, I address whether the historical

99 See, e.g., Amar, *supra* note 3, at 33 (explaining how the Preamble provided a context for understanding the articles of the Constitution).

100 U.S. CONST. art. I, § 3, cl. 1. Though they might in arguments seeking to *remove* that clause. See SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 16 (2006).

101 U.S. CONST. art. I, § 8, cl. 3.

102 See, e.g., Lash, *supra* note 91, at 1598–99.

103 See, e.g., ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 111–98 (2d ed. 1986).

104 See, e.g., RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 53 (2004) (explaining the role of liberty in natural rights protected under the Constitution).

105 This is not to say that all Resolution VI advocates believe that constitutional construction must always follow the original intentions of the framers or the original public understanding of the text. Some, in fact, expressly deny such restrictions on contemporary construction of the Constitution. See BALKIN, *supra* note 3, at 906–07. Nevertheless, all Resolution VI advocates use evidence of framers intent to legitimize

evidence supports the claims of Resolution VI advocates under either form of originalism.

III. RESOLUTION VI AND THE ORIGINAL INTENT OF THE FRAMERS

Because Resolution VI was not added to the text of the Constitution, and because its use was limited to the then-secret debates framing in Philadelphia, any plausible originalist argument in favor of using Resolution VI must rely on some form of original framers’ intent originalism. As we shall see, there is no evidence that Resolution VI played any role in the public debates over the ratification of the Constitution.¹⁰⁶ Therefore, the advocates of Resolution VI must establish that the framers intended the text of Article I, Section 8 to reflect and conform to the over-arching principle of Resolution VI.

Although an early phase of originalism purported to seek the original intent of the framers, that approach has since been broadly criticized on both normative and methodological grounds.¹⁰⁷ In terms of methodology, it is difficult to conceptualize a single “aggregated intent” of the framers.¹⁰⁸ And even if it were possible to isolate “group intent,” there does not appear to be any normative reason why courts should entrench that intent as a matter of constitutional law.¹⁰⁹ The framers themselves did not have—and did not claim to have—any authority whatsoever to establish fundamental law. That authority was held and exercised by the ratifiers in the state ratifying conventions. As James Madison later explained

[W]hatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as the oracular guide in expounding the Constitution. As the instrument came from them it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions. If we were to look, therefore, for the

and support their argument in favor of contemporary reliance on Resolution VI. *See supra* notes 3, 30. Reliance on original intent or original meaning is not, of course, self-legitimizing; use of original intentions or original understandings as guides to construction must itself be justified. For the purposes of this article, I explore only whether the originalist claims regarding Resolution VI meet the requirements of internal consistency in terms of being supported by available historical evidence.

106 *See infra* Part IV.A.

107 *See supra* notes 31, 32 and accompanying text.

108 *See* Solum, *supra* note 31, at 8–9.

109 There is the additional problem that original intent originalism must distinguish framers intentions which inform the actual *meaning* of the text, and those intentions which courts should use as a guide to construction, or application, of the text.

meaning of the instrument beyond the face of the instrument, we must look for it, not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution.¹¹⁰

The framers themselves did not believe their statements in convention should play any role in the public debate, and accordingly kept the proceedings secret. It is for this reason that scholars have long criticized the search for the framers' original intent as inconsistent with the original intent of the framers.¹¹¹

Actually, most originalists today agree with these criticisms. This is why the mainstream of contemporary originalism today seeks the original public meaning of the text, not the original intent of the framers.¹¹² This is a far more plausible approach to originalism and one that I address in some detail below. Nevertheless, because some originalists still follow original intent originalism,¹¹³ and because all originalists (and all advocates of Resolution VI)¹¹⁴ believe that information regarding the framers' understanding of their work is at least relevant to understanding the public meaning of words and phrases contained in the final text, it is worth exploring what we know, and do not know, about the intentions of the members who framed and adopted Resolution VI.

110 5 ANNALS OF CONG. 776 (1796) (remarks of Rep. James Madison). Madison's theory of ratifier understanding has been the subject of scholarly criticism. *See, e.g.,* RAKOVE, *supra* note 34, at 364 (arguing that Madison embraced the theory of ratifier understanding "less by his belief that they provided a viable method of interpretation than by the arguments of other speakers"). For the purposes of this article, I simply note that most originalists agree that the debates of the ratifying conventions provide a far more relevant source of original public understanding of the text than do the secret debates of the convention. To the extent that one embraces original meaning originalism as part of the normative theory of popular sovereignty, determining the consensus understanding of the sovereign ratifiers would be particularly important.

111 *See, e.g.,* Powell, *supra* note 32, at 937–39 (discussing Madison's discomfort with the ratifier's intent dictating the true meaning of the Constitution).

112 *See* Solum, *supra* note 31, at 20.

113 *See, e.g.,* Alexander & Prakash, *supra* note 31, at 970 (explaining the position of intentionalism).

114 This includes theorists like Jack Balkin who otherwise eschews relying solely on the original intentions of the framers. *See, e.g.,* BALKIN, *supra* note 3, at 912 n.27 ("I have argued that Resolution VI provides the proper structural principle and the best explanation for the list of enumerated powers, and, moreover, that this principle was actually intended by the Philadelphia Convention.").

A. *The Intent Behind Resolution VI*

The framers’ intent argument regarding Resolution VI seems simple enough: the framers intended Article I, Section 8 to be read in a manner that effectuates the principles of Resolution VI. So, for example, in its final form Resolution VI stated that Congress has power “to legislate in all cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation.”¹¹⁵ If Article I is to fully effectuate or “enact” the principle of Resolution VI, then potentially any purported exercise of power under Article I that involves “the general Interests of the Union,” or is a matter “to which the States are separately incompetent,” or is a case “in which the harmony of the United States may be interrupted by the Exercise of individual Legislation,” is presumptively constitutional.

Resolution VI advocates do not specify whether *every* clause in Article I Section 8 should be read as the “functional equivalent” or the “enactment” of Resolution VI,¹¹⁶ or whether only *some* of them should be read as a functional equivalents, or whether *none* of them individually contains the full breadth of Resolution VI but only the aggregated clauses contain the full breadth of power represented by Resolution VI.¹¹⁷ Most often, Resolution VI scholars focus on the Commerce Clause (though not exclusively) and argue that at least *that clause* should be read in a manner that fulfills the principle of Resolution VI.¹¹⁸ Thus, power to “regulate commerce among the several states” should be read as allowing Congress to regulate any matter involving the “general interests of the Unions,” or collective action problems “to which the states are incompetent” or “interrupt the harmony of the United States.”¹¹⁹ Again, it is unexplained how an entire Resolution,

115 2 FARRAND’S RECORDS, *supra* note 4, at 131–32.

116 See, e.g., BALKIN, *supra* note 3, at 912 n.27 (“In my view, the principle of Resolution VI underlies and should inform the proper construction of all of Congress’s enumerated powers.”).

117 For example, even if the Interstate Commerce Clause itself could not reasonably be interpreted to reach every collective action problem of national import, such problems might be adequately addressed through a combined use of Article I powers. See, e.g., Koppelman *supra* note 3, at 4–5.

118 See, e.g., Balkin, *supra* note 3, at 13; Koppelman, *supra* note 3, at 12–13.

119 Occasionally, Resolution VI advocates leave out the opening clause involving the power to legislate in “all cases for the general interests of the Union” when quoting Resolution VI. See, e.g., Koppelman, *supra* note 3, at 12 (quoting Resolution VI as power to “legislate in all cases . . . to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation”) (ellipsis in original). However, since Koppelman’s argument

one that supposedly informs the full text of Article I Section 8, can be applied in full to *one sentence* in Section I.

But putting that aside, there is an even more fundamental assumption made by Resolution VI advocates that is left unexplained. These scholars presume that the framers intended Resolution VI to inform the original meaning of *Article I, Section 8*, rather than intending that Article I Section 8 inform the original meaning of *Resolution VI*. After all, Resolution VI is itself an ambiguous provision. The framers could have understood the Resolution to mean “Congress shall have power to regulate all cases (now or hereafter) that involve the general interests of the United States, or to which the states are incompetent or which involve state legislation that interrupts national harmony.” On the other hand, the framers may have understood Resolution VI to mean “Congress shall have power to regulate all cases (that this Convention will eventually determine are matters) that involve the general interests of the United States, or to which the states are incompetent, or involve state legislation that interrupts national harmony.” The former would be a broad grant of discretionary federal power. The latter understanding would make Resolution VI a kind of placeholder until Congress ultimately went through the difficult effort of defining those matters that a majority of the convention believed ought to be placed under federal control.

This ambiguity in the meaning of Resolution VI is best described by historian Jack Rakove:

This open-ended language [of Resolution VI] may be interpreted in two ways. On the one hand, it may be viewed as an authentic formula for a national government whose legislative power would extend as its own discretion saw fit. On the other, it can also be read as a textual placeholder to be used so long as the great issue of representation remained unresolved, but then to be modified or even replaced by a list of particular powers.¹²⁰

Rakove concludes, “the process that unfolded during [the Committee of Detail’s] ten days of labor is better explained as an effort to identify particular areas of governance where there were ‘general Interests of the Union,’ where the states were ‘separately incompetent,’ or where state legislation could disrupt the national ‘Harmony.’”¹²¹ Although it is true that no one in the convention objected to Article I, Section 8 as conflicting with Resolution VI, the conven-

is that we should follow the framers’ intentions regarding Resolution VI as adopted, I presume that he means to refer to Resolution VI in its entirety.

120 RAKOVE, *supra* note 34, at 177–78.

121 *Id.* at 178.

tion’s lack of objection could simply reflect that framers consensus belief “that the scope of national lawmaking would remain modest.”¹²² As Rakove writes, even with the addition of the Necessary and Proper Clause, “[t]here is no reason to think that the framers believed [that Clause] would covertly restore the broad discretionary conception of legislative power in the Virginia Plan.”¹²³ In other words, simply because no one objected to Article I, Section 8 does not mean that the text should be construed to fit a broad conception of Resolution VI. If anything, the abandonment of Resolution VI and the ultimate adoption of a text of enumerated powers suggests that one ought *not* look to the Resolution VI as declaring an overarching principle of constitutional construction.

Had the convention understood Resolution VI as controlling the meaning of Article I, Section 8 and not the other way around, then once having adopted Article I, Section 8, the convention would have understood themselves as having granted Congress power to legislate (1) in all cases involving the general interests of the Union, (2) in all cases where the states were incompetent, and (3) in all cases where state legislation interrupted national harmony. In fact, we know for certain that the convention *did not* perceive itself as having conferred such power on Congress.

B. The Proposed Power of Incorporation in Cases When “Individual States May be Incompetent”

On August 6, 1787 the Committee of Detail presented the list of enumerated powers which became Article I, Section 8 of the federal Constitution.¹²⁴ Just over one month later, on September 14, the Convention discussed whether to give Congress the power to grant charters of incorporation.¹²⁵ The impetus for the discussion was Madison’s belief that Congress would need to create corporations for the building of an interstate system of canals.¹²⁶

If the members already believed Congress had the power to legislate in “all cases involving the general interests of the Union,” or in all cases where states were incompetent, or in cases where state legislation interrupted national harmony, then the members would have

122 *Id.* at 179.

123 *Id.* at 180.

124 2 FARRAND’S RECORDS, *supra* note 4, at 177, 181–83 (Madison’s notes).

125 *Id.* at 610, 615 (Madison’s notes).

126 *Id.* at 615.

thought they already had such power.¹²⁷ From the following conversation, it is clear they did not share such a belief, nor did they believe the principle of Resolution VI informed the scope of power that they had just conferred on Congress through the adoption of Article I, Section 8.

Here is the discussion as noted by James Madison:

Mr. Madison suggested an enlargement of the motion into a power “to grant charters of incorporation where the interest of the U. S. might require & the legislative provisions of individual States may be incompetent”. His primary object was however to secure an easy communication between the States which the free intercourse now to be opened, seemed to call for— The political obstacles being removed, a removal of the natural ones as far as possible ought to follow. Mr. Randolph 2ded. the proposition.

Mr King thought the power unnecessary.

Mr Wilson. It is necessary to prevent a *State* from obstructing the *general* welfare.

Mr King— The States will be prejudiced and divided into parties by it— In Philada. & New York, It will be referred to the establishment of a Bank, which has been a subject of contention in those Cities. In other places it will be referred to mercantile monopolies.

Mr. Wilson mentioned the importance of facilitating by canals, the communication with the Western Settlements— As to Banks he did not think with Mr. King that the power in that point of view would excite the prejudices & parties apprehended. As to mercantile monopolies they are already included in the power to regulate trade.

Col: Mason was for limiting the power to the single case of Canals. He was afraid of monopolies of every sort, which he did not think were by any means already implied by the Constitution as supposed by Mr. Wilson.

The motion being so modified as to admit a distinct question specifying & limited to the case of canals.

127 Others have pointed out the significance of discussions in the latter part of the convention that suggest the framers did not believe they had granted Congress plenary power. See, e.g., Robert G. Natelson & David Kopel, *Commerce in the Commerce Clause: A Response to Jack Balkin*, 109 MICH. L. REV. FIRST IMPRESSIONS 55, 59 (2010); Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 39–40 (1999). To my knowledge, no previous scholarship has noted the particular relevance of the discussion relating to charters of incorporation and claims that the framers understood Article I, Section 8 as having authorized Congress to regulate matters of national importance to which the states were separately incompetent.

N—H—no—Mas. no—Ct. no—N—J—no—Pa ay. Del. no—
Md. no. Va. ay. N—C—no—S—C. no—Geo. ay. [Ayes—3;
noes—8.]¹²⁸

In this short but important conversation, we learn a number of things. First, no one in the convention thought that Congress had been granted power to regulate matters in the “general interest of the Union” or to which the states were incompetent. Otherwise, Madison’s proposal “to grant charters of incorporation *where the interest of the U.S. might require & the legislative provisions of individual States may be incompetent*”¹²⁹ would be needless.

It also appears no one thought Congress had power to legislate in cases where the actions of the states interrupted the harmony of the United States. Wilson, for example, supported Madison’s proposal because he thought Congress did not currently have power to “prevent a *State* from obstructing the *general* welfare.”¹³⁰ Unless we are to think that one can “obstruct the general welfare” but not interrupt “the harmony of the United States,” Wilson did not think that either power currently existed *anywhere* under Article I, Section 8. In fact, it appears that Wilson—surely one of the strongest supporters of broad federal power—did not think Congress had power to incorporate a bank. Thus, while his response regarding “mercantile monopolies” was that Congress already had such power, his response to the Bank objection was that granting such power would not cause as much objection in Philadelphia and New York as Mr. King claimed. As for Col. George Mason, he did not think even *mercantile* monopolies had been authorized under Article I, Section 8.¹³¹

Had any member of the convention thought that Resolution VI was in anyway still operative, either as a rule of construction or as the “functional equivalent” of what they had accomplished in adopting Article I, Section 8, surely someone would have answered Madison’s concerns by pointing out that Congress *already had the power* in all cases where “the legislative provisions of individual States may be incompetent.”¹³² No one, in fact, said a word about Resolution VI, despite Madison’s use of the *same language* as one of the critical provisions in Resolution VI—the one most often relied upon by Resolution VI advocates. Instead, on a vote of 8 to 3, the majority voted against adding the very power that Resolution VI advocates claim the conven-

128 2 FARRAND’S RECORDS, *supra* note 4, at 610, 615–16 (Madison’s notes) (first emphasis added).

129 *Id.* at 615 (emphasis added).

130 *Id.*

131 *Id.*

132 *Id.*

tion already thought it had enacted.¹³³ Thus, it is simply not true that “there is no evidence that the convention rejected the structural principle stated in Resolution VI at any point during its proceedings.”¹³⁴ The debates over the incorporation power confirm that the Convention had in fact abandoned Resolution VI in favor of a limited set of enumerated powers.

Some Resolution VI advocates might object that we ought not be bound by the expected application of a principle originally adopted at the time of the Founding. However, even if it makes sense to adopt the text of Resolution VI because that was the framers’ intention, but nevertheless reject the framers’ intent regarding the scope of their own principle, this objection still misses the thrust of the above dialogue. The rejection of the power of incorporation even in cases “*where the interest of the U. S. might require & the legislative provisions of individual States may be incompetent*”¹³⁵ shows that the convention had *not* adopted the general structural principle of Resolution VI when they abandoned that language in favor of the enumerated powers of Article I, Section 8.

In sum, we do not know whether the Convention as a whole, or any individual member of the convention, understood Resolution VI as anything more than a placeholder. There is no evidence that any member, much less a majority, thought that Article I, Section 8 was the “functional equivalent” or “the enactment” of Resolution VI. Instead, there is express evidence that the convention, once it had adopted the enumerated powers of Article I, Section 8, *did not* believe it had granted Congress power in “all cases where the state are incompetent”¹³⁶ or where the actions of individual states threaten to obstruct the harmony of the United States. At most, members believed that the convention had empowered Congress in *some* cases that the Convention believed required federal action.

IV. JACK BALKIN, ORIGINAL PUBLIC MEANING AND RESOLUTION VI

Perhaps we should not be looking for the framers intent at all. After all, most originalists now seek the original meaning, or public understanding, of the text.¹³⁷ According to this approach, the meaning of a text is its likely public understanding at the time of its adop-

133 *Id.* at 610, 616.

134 Balkin, *supra* note 3, at 11.

135 2 FARRAND, *supra* note 4, at 610, 615 (Madison’s notes) (emphasis added).

136 *Id.*

137 See *supra* note 32 (providing scholarly explanations of modern alternatives to original intent).

tion. Evidence of framers’ intent may or may not be helpful in determining original public meaning, depending on whether the evidence illuminates the ultimate public understanding of the text. Not only do most (though not all) originalist scholars today adopt some form of original public meaning originalism, this appears to be the form of originalism preferred by a majority of the current Supreme Court.¹³⁸

To date, only one scholar has presented evidence that could support the claim that Resolution VI represented the public understanding of Article I, Section 8. In a recent article,¹³⁹ and in his book, *Living Originalism*, Yale Professor Jack Balkin argues that Resolution VI was the “animating principle” behind the enumerated powers of Article I and that this principle was part of the original understanding of the text.¹⁴⁰ According to Balkin, Resolution VI is a critical framework principle of the original Constitution, one that has structured and justified the development of the modern regulatory state. It is precisely because this framework principle can be traced back to the original understanding of the Constitution that people today can and should accept broad readings of federal power as “our law.”¹⁴¹

As with other Resolution VI advocates, much of Balkin’s argument is built on claims of original framers intent. For example, Balkin argues that “the purpose of enumeration was not to *displace* the principle [of Resolution VI] but to *enact* it.”¹⁴² He does not expressly say so, but it is clear from the context that he is speaking of the *framers’ purpose* in enumerating the powers of Article I. Sometimes Balkin’s reliance on original intent is clear, as when he argues that Wilson’s speech at the Philadelphia Ratifying Convention represented “the structural assumptions of the drafters in Philadelphia.”¹⁴³ Other times, the reference to framers’ intent must be constructed out of Balkin’s use of passive language, as when he states that “[t]he structural principle of Resolution VI . . . was designed to be adaptable to changing circumstances,”¹⁴⁴ or where he argues that “all of Congress’s powers were designed to realize the structural principle of Resolution VI.”¹⁴⁵ The missing subjects in these sentences are the framers in the

138 See *District of Columbia v. Heller*, 554 U.S. 570, 576–628 (2008) (containing an extensive investigation of the original understanding of the Second Amendment).

139 Balkin, *supra* note 3.

140 See BALKIN, *supra* note 3, at 908.

141 See *id.* at 920, 949.

142 Balkin, *supra* note 3, at 11.

143 *Id.* at 8.

144 *Id.* at 10.

145 *Id.* at 12.

Philadelphia Convention. As an argument of original intent, Balkin's reading fails for the same reasons described in the previous section. There is no reason to think the framers intended to "enact" Resolution VI at all, and strong evidence suggesting they did not.

One of Balkin's key arguments, however, moves beyond original framers intent and attempts to tie Resolution VI to the original public understanding of the text. In the opening of his discussion of Resolution VI, Balkin relies on statements made by James Wilson in the Pennsylvania Convention. According to Balkin, "[t]he basic principles underlying the list of enumerated powers were well stated by one of the key Founders, James Wilson, in the Pennsylvania ratifying convention in November of 1787."¹⁴⁶ Balkin then quotes Wilson:

Whatever object of government is confined, in its operation and effects, within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends, in its operation or effects, beyond the bounds of a particular state, should be considered as belonging to the government of the United States.¹⁴⁷

According to Balkin, "Wilson was doing no more than summarizing the structural assumptions of the drafters in Philadelphia. The origins of Congress's powers go back to the sixth of the resolutions prepared by the Virginia delegation"¹⁴⁸ Then, in another key passage, Balkin explains:

[T]here is no evidence that the convention rejected the structural principle stated in Resolution VI at any point during its proceedings. Indeed, this principle was the *animating purpose* of the list of enumerated powers that appeared in the final draft, and it was the key explanation that Framer James Wilson offered to the public when he defended the proposed Constitution at the Pennsylvania Ratifying Convention. Wilson was a member of the Committee of Detail and he would certainly have known if the Committee had abandoned the principle of Resolution VI. As Wilson explained, however, the purpose of enumeration was not to *displace* the principle but to *enact* it:

146 *Id.* at 8.

147 *Id.* (quoting 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 399 (Jonathan Elliot ed., 2d ed. 1891) (remarks of Rep. James Wilson)).

148 *Id.* See also BALKIN, *supra* note 3, at 912 n.27 ("James Wilson, who was a member of the Committee of Detail, and one of the first justices appointed to the Supreme Court, publicly represented that the principle of Resolution VI *was* the basis for the choice of enumerated powers.").

[T]hough this principle be sound and satisfactory, its application to particular cases would be accompanied with much difficulty, because, in its application, room must be allowed for great discretionary latitude of construction of the principle. In order to lessen or remove the difficulty arising from discretionary construction on this subject, an enumeration of particular instances, in which the application of the principle ought to take place, has been attempted with much industry and care.¹⁴⁹

Balkin’s use of James Wilson’s speech in the Pennsylvania Convention marks an important departure from arguments based solely on original intent. It allows him to make an argument that draws upon evidence of *both* original intent and original public meaning. As Balkin puts it in his general discussion of “structural principles”—principles which the reader will learn include Resolution VI—“[m]any of these structural principles were intended by people who drafted the Constitution *and they explained their ideas in debates about the Constitution*.”¹⁵⁰

Balkin’s belief that Wilson was referring to Resolution VI accomplishes a number of important tasks at once. First, without Wilson, there is no evidence that the Committee of Detail understood the final text as enacting the principle of Resolution VI.¹⁵¹ As Jack Rakove has pointed out, Resolution VI may have been intended as nothing more than a placeholder with the members anticipating its ultimate replacement with a more precise (and limited) statement of national power.¹⁵² We also know that this is quite likely the case, given the discussion regarding the proposed power of incorporation. However, if Wilson is in fact referring to Resolution VI as the guiding principle

149 Balkin, *supra* note 3, at 11 (alteration in original) (quoting 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 399 (Jonathan Elliot ed., 2d ed. 1891) [hereinafter ELLIOT’S DEBATES] (remarks of Rep. James Wilson)).

150 *Id.* at 7 (emphasis added). See also BALKIN, *supra* note 3, at 912 n.27 (“James Wilson, who was a member of the Committee of Detail, and one of the first justices appointed to the Supreme Court, *publicly represented* that the principle of Resolution VI *was* the basis for the choice of enumerated powers.”) (emphasis added).

151 Indeed, some historians have argued that, by adopting a list of enumerated powers, the Committee of Detail violated the instruction to produce a draft faithful to the principle announced by the amended version of Resolution VI. See, e.g., FORREST McDONALD, *E PLURIBUS UNUM* 286–302 (2d ed. 1979). If this is true, it makes an even stronger case for rejecting Resolution VI as representing the framers understanding of the ultimate text.

152 RAKOVE, *supra* note 34, at 177–78.

for Article I, Section 8, then this would be evidence that at least one member saw a connection between the Resolution and Article I.

Secondly, even if the language of Article I, Section 8 was in fact viewed as following the principle of Resolution VI to the letter, nothing in the records of the Convention tells us whether the framers understood the Resolution as presenting a broad, moderate or narrow view of federal power. For example, resolutions like that of Roger Sherman's could be viewed as extremely narrow (Sherman's own view) or quite broad (thus explaining why Wilson preferred Sherman's language until he heard Sherman's explanation).¹⁵³ Likewise, even the detailed language of Article I, Section 8 was capable of broad or narrow readings, as we saw in the discussion regarding the power of incorporation.¹⁵⁴ Thus, if James Wilson was speaking about Resolution VI, and if his views are representative, then his speech is evidence of a broad understanding of the Resolution's underlying principle. This would allow Balkin to resolve an otherwise inescapable ambiguity regarding the framers' vision of Resolution VI.

Third, and most importantly, if Wilson publicly linked Resolution VI to the final draft of the Constitution early in the ratification debates, then this opens the door to claims that this understanding of Article I, Section 8 was part of the public debates about the meaning of the Constitution.¹⁵⁵ This would be an argument about original public meaning, and not just an argument about original framers' intent. In other words, if Wilson was talking about Resolution VI, then this overcomes the most serious problem with relying on a text presented in the secret Philadelphia debates.

There is only one problem: Wilson was not speaking about Resolution VI.

A. *James Wilson's "General Principle" of Federal Power*

It turns out that Resolution VI was never mentioned during the Ratification Debates. This includes the speech of James Wilson in the Pennsylvania Convention.¹⁵⁶ As explained in the opening section of this essay, Resolution VI was not publically known prior to the initial publication of the Philadelphia debates—an event occurring years after the adoption of the Constitution.¹⁵⁷ As far as I can tell from my

153 See *supra* note 63 and accompanying text (discussing Roger Sherman's proposed alteration of Resolution VI).

154 See *supra* Part III.B.

155 See BALKIN, *supra* note 3, at 905.

156 See Balkin, *supra* note 3, at 11.

157 See *supra* note 78 and accompanying text.

research, it was not until the twentieth century that *anyone* claimed Resolution VI had anything to do with the meaning of Article I, Section 8. So what makes Balkin think otherwise?

Balkin has mistakenly assumed that, when James Wilson referred to the “general principle” of federal power that guided the drafting of Article I, Wilson was referring to the articulated principle of Resolution VI.¹⁵⁸ He was not. Wilson was speaking of the general principle articulated by Roger Sherman’s proposed amendment—language that Wilson described at the time “as *better* expressing the general principle.”¹⁵⁹ This becomes clear when one compares the language of Resolution VI with that of Sherman’s amendment and Wilson’s “general principle.”

Here is the final version of Resolution VI: “[T]o legislate in all Cases for the general Interests of the Union, and also in those to which the States are separately incompetent or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation.”¹⁶⁰

Here is Sherman’s amendment:

[T]o make laws binding on the people of the (United) States in all cases (which may concern the common interests of the Union); but not to interfere with (the Government of the individual States in any matters of internal police which respect the Govt. of such States only, and wherein the General) welfare of the U. States is not concerned.¹⁶¹

Here is Wilson’s “general principle” as quoted by Balkin:

Whatever object of government is confined, in its operation and effects, within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends, in its operation or effects, beyond the bounds of a particular state, should be considered as belonging to the government of the United States.¹⁶²

Wilson’s “general principle” is the same as Sherman’s amendment; only the internal order of subjects is reversed. Sherman’s

158 Balkin was not the first scholar to assume that Wilson was discussing the general principle of Resolution VI. See, e.g., Mark Moller, *A New Look at the Original Meaning of the Diversity Clause*, 51 WM. & MARY L. REV. 1113, 1170 & n.212 (2009).

159 2 FARRAND’S RECORDS, *supra* note 4, at 26 (Madison’s notes) (emphasis added).

160 *Id.* at 131–32.

161 *Id.* at 25.

162 Balkin, *supra* note 3, at 8 (quoting 2 ELLIOT’S DEBATES, *supra* note 149, at 424). The version of Wilson’s speech that Balkin uses is the version by Thomas Lloyd. This version is also reproduced in 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 350, 355 (Merrill Jensen ed., 1976) [hereinafter DHRC].

amendment *ends* with powers reserved to the states, while Wilson *begins* with powers reserved to the states. Both Sherman and Wilson's principle have the same structure and content. They both address how powers are to be divided between the state and national governments. They also both announce the same theory: matters that involve only the internal concerns of a single state are reserved to the state, while matters that involve the general interests of the Union belong in the hands of the federal government. Resolution VI, on the other hand, has completely different content and a completely different structure. Its sole subject is federal power and the Resolution lacks the "mirror image" structure of Sherman's and Wilson's principles. Balkin has simply assumed that Wilson must have been talking about the Convention's generally preferred version of the "general principle." He was not. Wilson was referring to *his* preferred version of the "general principle," the one Wilson thought was "better" than Resolution VI.

One might think this makes little difference, since one could construct a similar theory of federal power out of either Wilson's or the Convention's preferred "general principles." In fact, Wilson's preference of his own principles over that of the Convention makes all the difference in the world in regard to whether Resolution VI represents a publicly accepted principle of construction for interpreting the enumerated powers of Article I. If Wilson was not speaking of Resolution VI, then this means that there is no evidence that Resolution VI was mentioned at all during the ratification debates. This removes the only available argument that the language of Resolution VI informed the public understanding of Article I, Section 8.

B. The Two Versions of James Wilson's Speech

There is more. Professor Balkin invests a great deal of time discussing the meaning of Wilson's phrase "operations and effects" in the belief that this is Wilson's and the framers' phrase for describing the principle of Resolution VI.¹⁶³ Indeed, the phrase "operations and effects" is one of the subheadings of his article on Resolution VI and the Commerce Power.¹⁶⁴ To Balkin, the term "operations" refers to Congress's traditional power to regulate "whatever crosses state lines."¹⁶⁵ The term "effects," however, has much broader implications. As Balkin puts it:

163 See Balkin, *supra* note 3, at 29–30.

164 *Id.* at 29.

165 *Id.* at 30.

What kinds of interactions have *effects* beyond a single state? These are interactions that create spillover effects or collective action problems. In the words of Resolution VI, commerce is “among the several states” when the states are “separately incompetent” to deal with a particular issue, “or [when] the Harmony of the United States may be interrupted by the Exercise of individual Legislation.”¹⁶⁶

This is a key passage in Balkin’s work. To Balkin, Wilson was speaking about Resolution VI when he used the phrase “operations and effects,” and that this reflected both the framers’ intentions and would have informed the public’s understanding of Article I, Section 8. Balkin also quotes Wilson’s reported declaration that “room must be allowed for great discretionary latitude of construction of the principle” and concludes that Wilson’s speech conclusively disproves claims by Professor Randy Barnett that the framers’ ultimately rejected Resolution VI.¹⁶⁷

The problem is, we cannot be sure Wilson ever used the phrase “operation and effects,” or, if he did, whether anyone outside the Pennsylvania convention hall ever found out. It turns out that there are two versions of James Wilson’s speech of November 24. Only one of these versions contains the phrase “operations and effects” and talks about “great discretionary latitude of construction,” and this was not the version first published and widely distributed after Wilson’s speech.

The first version of Wilson’s speech was a summary composed by Alexander J. Dallas and published in the Pennsylvania Herald on November 28, 1787.¹⁶⁸ On the same day, a longer version, also from Dallas’s notes, was reprinted as a pamphlet and, as the DHRC puts it “circulated throughout the country.”¹⁶⁹ By January 7, 1788, Dallas’s version had been reprinted in eleven newspapers in Massachusetts,

166 *Id.* at 31 (quoting 2 FARRAND’S RECORDS, *supra* note 4, at 21, 26, 131–32 (Madison’s notes)).

167 *Id.* at 11. Here is the portion of Wilson’s speech quoted by Balkin:

[T]hough this principle be sound and satisfactory, its application to particular cases would be accompanied with much difficulty, because, in its application, room must be allowed for great discretionary latitude of construction of the principle. In order to lessen or remove the difficulty arising from discretionary construction on this subject, an enumeration of particular instances, in which the application of the principle ought to take place, has been attempted with much industry and care.

Id. (quoting 2 ELLIOT’S DEBATES, *supra* note 149, at 424–25).

168 See 2 DHRC, *supra* note 162, at 339.

169 *Id.*

New Hampshire, Rhode Island, Connecticut, and New York.¹⁷⁰ The pamphlet raised immediate objections by some of Wilson's supporters who claimed it was "very inaccurate, and not only parts are omitted and the leading points often lost for want of seizing the exact expression, but some parts are absolutely misstated."¹⁷¹ Accordingly, Thomas Lloyd prepared a second version that promised to be Wilson's speech "without mutilation or misrepresentation."¹⁷² This second version, however, was not printed until February 7, 1788, well after the initial circulation and responses to, Dallas's initial version.¹⁷³

Here is the relevant passage of Dallas's initial and widely circulated version of Wilson's speech of November 24th:

Another, and perhaps the most important obstacle to the proceedings of the Federal Convention arose in drawing the line between the national and the individual governments of the states.

On this point a general principle readily occurred, that whatever object was confined in its nature and operation to a particular state ought to be subject to the separate government of the states, but whatever in its nature and operation extended beyond a particular state ought to be comprehended within the federal jurisdiction. The great difficulty, therefore, was the application of this general principle, for it was found impracticable to enumerate and distinguish the various objects to which it extended; and as the mathematics, only, are capable of demonstration, it ought not to be thought extraordinary that the Convention could not develop a subject involved in such endless complexity. If however, the proposed Constitution should be adopted, I trust that in the theory there will be found such harmony, and in the practice such mutual confidence between the national and individual governments, that every sentiment of jealousy and apprehension will be effectually destroyed.¹⁷⁴

Just for comparison, here is the (somewhat longer) Thomas Lloyd version of the same passage that was published months after the fact:

They found themselves embarrassed with another of peculiar delicacy and importance; I mean that of drawing a proper line between the national government and the government of the several states. It was easy to discover a proper and satisfactory principle on the subject. Whatever object of government is confined in its operation

170 *Id.*

171 *Id.* (quoting Letter from Samuel Vaughan, Jr. to James Bowdoin, Governor of Massachusetts (Nov. 30, 1787)).

172 *Id.*

173 *Id.*

174 *Id.* at 344.

and effects within the bounds of a particular state should be considered as belonging to the government of that state; whatever object of government extends in its operation or effects beyond the bounds of a particular state should be considered as belonging to the government of the United States. But though this principle be sound and satisfactory, its application to particular cases would be accompanied with much difficulty; because in its application, room must be allowed for great discretionary latitude of construction of the principle. In order to lessen or remove the difficulty arising from discretionary construction on this subject, an enumeration of particular instances, in which the application of the principle ought to take place, has been attempted with much industry and care. It is only in mathematical science that a line can be described with mathematical precision. But I flatter myself that upon the strictest investigation, the enumeration will be found to be safe and unexceptionable; and accurate too in as great a degree as accuracy can be expected in a subject of this nature.¹⁷⁵

In the first and most widely circulated version, Wilson speaks of “object[s] . . . confined in [their] *nature and operation*,”¹⁷⁶ not “*operation and effects*.”¹⁷⁷ Also, in the first version, there is no mention of how “room must be allowed for great discretionary latitude of construction of the principle,”¹⁷⁸ the quote Balkin relies on in response to Barnett as proof that “the purpose of enumeration was not to *displace* the principle but to *enact* it.”¹⁷⁹ It may well be that Balkin is relying on the more accurate account of Wilson’s actual speech—though we cannot know that.¹⁸⁰ Even if so, this is not the version of Wilson’s speech the public first saw printed in the newspaper days after the speech, nor was this the version that the wider public saw as it was reprinted in eleven different states from November 28, 1787 through February 7, 1788.¹⁸¹

The version Balkin relies upon was not printed until months after Wilson’s speech, long after almost all of the major commentary on the speech had been written and published.¹⁸² I have not found a single newspaper that reported this later version of Wilson’s speech, nor

175 *Id.* at 355.

176 *Id.* at 344 (emphasis added).

177 *Id.* at 355 (emphasis added).

178 *Id.*

179 Balkin, *supra* note 3, at 11.

180 There is (literally) no reason to believe that a version of the speech published long after the fact by one of Wilson’s supporters reflects a more accurate version of Wilson’s original speech than a version published immediately after the fact.

181 *See supra* notes 168–175 and accompanying text.

182 *See* 2 DHRC, *supra* note 162, at 339.

have I been able to locate a single example of anyone other than Wilson who at any time during the ratification debates described federal power as extending to those matters that in their “operation and effects” extended beyond a single state. Given that no one else repeated his views, it would be hard enough to establish that the *first* version of Wilson’s speech played any role in the public understanding of Article I, Section 8.¹⁸³ Establishing such a point in regard to a second much later, and far less distributed, version is even more unlikely.

In short, even if Balkin’s version of Wilson’s is the more accurate, it cannot serve to establish a claim that Wilson believed Resolution VI represented the general principle that informed the drafting of Article I, Section 8, much less establish that Resolution VI played any role in the ratification debates. Neither version of Wilson’s speech contains any mention of Resolution VI, and the version Balkin and others¹⁸⁴ rely on was not the version widely distributed to the public. Thus, not only is there no evidence Wilson was talking about Resolution VI, there is little reason to think his discussion of “operation and effects” and the need to “allow[] . . . for great discretionary latitude of construction of the principle”¹⁸⁵ played any significant role in the

183 Wilson’s Statehouse Speech and his explanation regarding the omission of the Bill of Rights was extremely influential during the ratification debates. See PAULINE MAIER, *RATIFICATION* 77–82 (2010). However, there is no evidence that the above quoted portions of his speech in the Pennsylvania Convention had any effect whatsoever. In fact, the manner in which Pennsylvania conducted its ratifying convention and suppressed alternative views became something of a scandal as the debates in other states went forward. See *id.* at 127. There are additional problems with relying too heavily on Wilson as representing a consensus view of federal power in light of his later unsuccessful efforts to almost completely eviscerate the states as independent entities in the Philadelphia Convention. See Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 140–43 (1996); see also *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 457–58 (1793) (opinion of Wilson, J.) (arguing that claims of state sovereignty rested on a feudal conception of sovereignty which, although “degrading to man,” nevertheless “still retains its influence over our sentiments and conduct, though the cause, by which that influence was produced, never extended to the *American States*”). Although Madison originally shared Wilson’s views, see Monaghan, *supra*, at 140–41, Madison moved to a more balanced Federalist view of national power following the adoption of the “Connecticut Compromise” which gave states equal representation in the Senate. See, e.g., THE FEDERALIST NO. 39, *supra* note 25, at 246 (James Madison) (“[The proposed Constitution is] neither wholly *national* nor wholly *federal*”); see also GORDON S. WOOD, *EMPIRE OF LIBERTY* 32 (2009).

184 See, e.g., Amar, *supra* note 3, at 2003 n.23; Cooter & Siegel, *supra* note 3, at 124.

185 2 ELLIOT’S DEBATES, *supra* note 149, at 399 (remarks of Rep. James Wilson).

public debate and understanding of the text of Article I, Section 8—if in fact Wilson actually used these words at all.

CONCLUSION

There may be, in fact, good instrumental or normative reasons to move from a system of judicially limited enumerated power to one of majoritarian oversight of national “harmony.” But such arguments must stand on their own merits without the normative and rhetorical assistance of originalism. Resolution VI never made it to the text of the Constitution. Once the framers moved from general principle to operative specifics they never mentioned Resolution VI again. Instead they acted on the assumption that the federal government would *not* have power to solve all collective action problems of national import. Most of all, those who debated and adopted the text of Article I, Section 8 knew nothing about Resolution VI. Scholarly claims that James Wilson publicly linked Article I, Section 8 to Resolution VI and congressional power to regulate “operations and effects” are doubly incorrect.

Instead, the available historical record tells a very different story. When faced with Anti-Federalist claims that Article I, Section 8 would grant the national government unlimited power and eradicate the sovereign independence of the states, the Federalists responded that the text must be read as following a principle of limited enumerated power. According to Hamilton in the New York Ratifying Convention, “whatever is not expressly given to the federal head, is reserved to the members.”¹⁸⁶ According to Charles Pinckney in the South Carolina debates, “no powers could be executed, or assumed [by the federal government], but such as were expressly delegated.”¹⁸⁷ During the ratification debates, Madison insisted that the proposed federal government’s “jurisdiction is limited to certain enumerated objects,”¹⁸⁸ and in 1791 he reminded the House of Representatives that the proponents of the Constitution had assured the state conventions that “the general government could *not* exceed the *expressly-delegated* powers.”¹⁸⁹ This principle of textual enumeration presupposes the existence of other powers not enumerated and reserved to the states. As John Marshall put it, “[t]he enumeration presupposes something not

186 2 ELLIOT’S DEBATES, *supra* note 149, at 342 (remarks of Rep. Alexander Hamilton).

187 4 ELLIOT’S DEBATES, *supra* note 149, at 259 (remarks of Rep. Charles Pinckney).

188 THE FEDERALIST NO. 14, *supra* note 25, at 102 (James Madison).

189 4 ELLIOT’S DEBATES, *supra* note 149, at 414.

enumerated.”¹⁹⁰ Marshall also presciently noted that the struggle to identify the “line between ‘what is truly national and what is truly local’”¹⁹¹ would “probably continue to arise, so long as our system shall exist.”¹⁹² The perpetual struggle to maintain this distinction exists because the framers abandoned Resolution VI and adopted instead a system of enumerated powers.

190 *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824).

191 *Gonzales v. Raich*, 545 U.S. 1, 38 (2005) (Scalia, J. concurring) (quoting *United States v. Lopez*, 514 U.S. 549, 567–68 (1994)).

192 *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819).